

Supreme Court, U. S.
FILED

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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

October Term, 1977

No. 77-93

MASONIC HOME OF DELAWARE, INCORPORATED,
Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF DELAWARE and FREDERICK FESEL,
Respondents.

**BRIEF IN OPPOSITION TO THE
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.**

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The respondent, Frederick Fesel, prays that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit be denied.

OPINIONS BELOW.

Contrary to petitioner's representation, an opinion has been issued below on related aspects of this case. *Fesel v. Masonic Home*, 428 F. Supp. 573 (D. Del. 1977).

QUESTIONS PRESENTED FOR REVIEW.

- I. Should Certiorari Issue On An Erroneous Representation Of The Facts?
- II. Was Not The District Court Correct In Ruling That A Jury Trial Does Not Lie In A Title VII Action Seeking Only Equitable Relief?

STATEMENT OF THE CASE.

Petitioner, Masonic Home, is a nursing home with a varying male and female population. On November 5, 1973, the plaintiff, a nursing student at the time in question who has since become a registered nurse, responded to a newspaper advertisement placed by the defendant seeking nurse's aides. Ms. Doris Husted, assistant superintendent of the Home, informed Mr. Fesel that because of the predominantly female population of the Home it would not employ a male nurse's aide. See *Fesel v. Masonic Home*, 428 F. Supp. 573 (D. Del. 1977). It has subsequently been determined, at the deposition of Claude A. Husted, administrator of the Home, that the Home's historic "custom" is the sole reason for this discrimination against males. Moreover, no attempt has ever been made to determine whether this employment criterion is job related.¹

1. "Q. Now, can you tell me when the decision was ever made that sex was a controlling factor in the hiring of nurse's aides, or was it made before you even got there?"

A. It's always been thus, that the custom has always dictated it.

. . . .

Q. So it's your testimony it's always been the custom out there that females were nurse's aides and you didn't hire any males?

A. Yes.

. . . .

Q. So no scientific studies were ever made to determine the relationship between your criteria and the actual effect it might have on your guests?

A. No.

Deposition of Claude A. Husted taken on September 7, 1977, at 108-109, 124, 125.

After complying with the procedural requisites of the Act, suit was filed in The United States District Court for the District of Delaware on July 16, 1976. In the Relief portion of the Complaint, paragraph (d), plaintiff sought compensatory damages in the amount of \$1,000. The defendant filed for summary judgment which was denied in the above-mentioned Opinion. Mandamus was taken to the Third Circuit from the denial of summary judgment and the petition was denied on April 1, 1977. The primary issue remaining for trial is whether sex is a bona fide occupational qualification under the Act which in the context of this case would disqualify males from employment as nurse's aides.

On April 29, 1977 plaintiff filed a motion to strike defendant's demand for a jury trial. That motion was granted by the Court on May 31, 1977 and these proceedings began. At oral argument on that motion counsel for plaintiff made it abundantly clear that the complaint was inartfully drawn. General compensatory damages were not sought, but instead, only equitable relief—backpay—was desired.²

Another hearing was held before the District Court when defendant moved that the trial set for October 25 be stayed pending this Court's disposition of the Petition for a Writ of Certiorari. Since defendant had not made the requisite showing for a stay, its motion was denied. The Third Circuit affirmed that denial on September 2, 1977 and an application for a stay is pending before this Court. Again, at this second hearing before the District Court, counsel for plaintiff affirmatively represented that only backpay, equitable relief, is sought. To make the record unmistakably clear in this regard plaintiff on September 23, 1977 filed a motion in the District Court seeking to

2. Counsel has been unable to obtain a transcript of that proceeding.

amend the Complaint by striking subparagraph (d) of the Demand for Relief in its entirety and substituting the following: "(d) Require the defendant to pay *backpay* to plaintiff in the amount of \$1,000." (emphasis supplied)

By letter dated July 28, 1977, counsel for Frederick Fesel affirmatively waived his right to file a response to the Petition for Certiorari in this case. However, by letter dated September 6, 1977 the Court requested that this opposition be filed.

ARGUMENT.

I. Certiorari Should Not Issue on an Erroneous Representation of the Facts.

The entire Petition of the Masonic Home is premised on an erroneous representation of the facts. The Home has stated that plaintiff below is seeking compensatory damages. Since compensatory damages are a traditional tort remedy, a jury trial, it is argued, logically follows. The fallacy of this position is that it does not accord with the facts below. Counsel for plaintiff has twice represented to the District Court that only backpay, equitable relief under Title VII, is demanded. The Court acted on this representation in making its rulings. If there was any ambiguity in the record it has been removed by plaintiff's Motion to Amend the Complaint filed on September 23, 1977. Thus, since certiorari is a matter of sound judicial discretion, Rule 19(1), and the record is not as originally presented, the petition should be denied.

Alternatively, even assuming that the defendant's representation of the record is correct, a jury trial would still be improper. Plaintiff can demand compensatory damages but under the Act they simply are not recoverable. *Loo v. Gerarge*, 374 F. Supp. 1338, 1341-1342, (Haw. 1974); *Howard v. Lockheed-Georgia Co.*, 372 F. Supp. 854, 855-856 (N. D. Ga. 1974); *Van Hoomissen v. Xerox Corp.*, 368 F. Supp. 829, 835-838 (N. D. Cal. 1973). It then would be error for the District Court to grant compensatory damages. That error could be easily corrected on appeal since the trial is only to the District Court. But the error should not be compounded, as defendant argues, by adding the burden and expense of a jury trial to the issue.

II. A Jury Trial Does Not Lie in a Title VII Action Seeking Only Equitable Relief.

With the above error in the factual record corrected, this becomes only a case seeking equitable relief. The question remaining is whether a jury trial is proper in this circumstance. While this Court has rendered no decision on the subject, the Circuit Courts are all in accord that an award of equitable relief, backpay, is not within the scope of the Seventh Amendment and thus a jury trial is improper in a Title VII action. E.g. *Slack v. Havens*, 522 F. 2d 1091 (9th Cir. 1975). Defendant's contention thus has little merit and little probability of success. If any doubt remains as to the inappropriateness of a jury trial in this setting it should have been removed when the United States Senate considered the Equal Employment Opportunity Act of 1972. The Senate specifically rejected an amendment which would have required a jury trial in Title VII cases involving backpay. 118 Cong. Rec. 4917, 4919-4920 (1972) (remarks of Sens. Ervin and Javits).

CONCLUSION.

This Court should not be misled by defendant's attempt to obtain a jury trial in an effort to inflame the bona fide occupational qualification issue remaining to be determined in this case. That issue is properly before the District Court to decide after hearing all the evidence.

WHEREFORE, the Respondent, Frederick Fesel, respectfully prays that the Writ of Certiorari be denied.

Respectfully submitted,

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*Attorney for Respondent,
Frederick Fesel.*

STATE OF DELAWARE: }
NEW CASTLE COUNTY: } ss.

I, the undersigned, hereby declare and say: I am and was at all times herein mentioned, a citizen of the United States and employed in New Castle County, State of Delaware. I am over the age of eighteen years and am not a party to the within action or proceeding.

My business address is 1102 West Street, Wilmington, Delaware 19801. On September 27, 1977, I served the within Brief in Opposition To The Petition For Writ Of Certiorari To The United States Court of Appeals For The Third Circuit (Masonic Home of Delaware, Incorporated v. United States District Court For The District of Delaware and Frederick Fesel) on the following-named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereof fully prepaid, in the United States Post Office in the City of Wilmington, Delaware, addressed to the parties at the address as follows:

Clement C. Wood
Allmond & Wood
621 Wilmington Trust Bldg.
Wilmington, Delaware
19801

Honorable Walter K.
Stapleton
U. S. District Court
9th & King Streets
Wilmington, Delaware
19801

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 27, 1977 at Wilmington, Delaware.

CAROL L. PAULA

SWORN TO AND SUBSCRIBED before me this 27th day of September, 1977.

LINDA FILLINGIM
Notary Public